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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of	)	GC Docket No. 92-52
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	
	)	RM-7739
	)	RM-7740
	)	RM-7741

TO: The Commission

REPLY COMMENTS OF REED SMITH SHAW & McCLAY

The firm of Reed, Smith, Shaw & McClay ("RSSM") submits these Reply Comments principally with respect to the comments submitted by Black Citizens for a Fair Media, et al. ("BCFM"). As shown below, its comments are based on a false premise, namely that the lifting of the previous three year rule resulted in trafficking in broadcast licenses leading to "instability" in the broadcast industry. BCFM's comments, moreover, are nothing more than a rehash of the similar arguments advanced by some of the same parties in the 1982 proceeding which eliminated the trafficking rule,[1] in the 1985 reconsideration of that action[2] and in the 1986 attempt to have the Commission reinstate the trafficking rule,[3] all of which were rejected by the Commission.

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1 Transfer of Broadcast Facilities, 52 RR 2d 1081 (1981).

2 Transfer of Broadcast Facilities (Recon), 99 FCC 2d 971 (1985).

3 See, United Church of Christ v. FCC, 911 F.2d 813 (D.C. Cir. 1990).

In United Church of Christ, the Court rejected UCC's[4] reliance on past Commission and Court decisions relating to trafficking emphasizing that nothing in the Communications Act prohibits trafficking and that the Commission had the flexibility to reconsider and revise its past determination of what the public interest requires in relation to trafficking. 911 F.2d at 817. The Court also held that in Crowder v. FCC, 399 F.2d 569 (D.C. Cir. 1968), the same case upon which BCFM now relies (BCFM Comments at 6), the Court had not held that trafficking was inconsistent with the public interest but was merely upholding as reasonable the Commission's prior determination of what would best serve the public interest. Id.

In addition to finding that the Commission had acted reasonably in eliminating the trafficking rule, the Court in United Church of Christ also approved the Commission's rejection of UCC's contentions that the abolition of the rule had affected public service and children's programming and had led to instability in the broadcast industry. Id. at 818.

BCFM's instant comments are nothing more than yet another attempt to resuscitate the old trafficking rule based on the same tired arguments it and its cohorts have advanced in the past. They offer nothing new and should be rejected once again. Indeed, the arguments ring even more false this time around. With an intervening decade of actual experience, BCFM should be able to

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[4] UCC is also a party to the BCFM Comments.

document any decline in children's and public service programming due to trafficking but no such effort is made.

In any event, it is hard to imagine how the public could have or want more informational programming available to it with all of the extensive news programs, talk shows and weekly discussion programs available on television and radio. As for educational programming for children, trafficking is irrelevant since Congress has established the public interest parameters for all stations. While BCFM theorizes that stations acquired for short term resale will not serve the public interest, with ten years of experience it is unable to present any evidence that stations held for a short time are less likely than others to provide good service to the public. BCFM does report that 50% of television stations and 20% of radio stations dropping news did so because they could no longer afford to carry it (BCFM Comments at 15-16), but they offer no evidence that these stations' financial condition is in any way related to trafficking.

In an attempt to provide some semblance of factual support for its allegation that trafficking causes instability in the broadcast industry, BCFM relies on statistics showing year by year the number of stations sold and the prices paid for them. From this it concludes that "the television market experienced wide fluctuations in the volume of sales and prices after repeal of the anti-trafficking rule." (BCFM Comments at 8.) It reaches similar conclusions for radio stations. (BCFM Comments at 9.) As we understand its argument, BCFM would have the Commission believe that abolition of the trafficking rule caused the number of

stations sold and their prices to go up and then to come down. BCFM leaves unexplained how this single act could lead to these inconsistent results. In fact, BCFM has fallen prey to one of the classic logical fallacies - post hoc, ergo propter hoc. The fact that one event occurs after another does not in any way demonstrate that the second event was caused by the first. Yet, that is all that BCFM offers here. Prices went up and down after the abolition of the trafficking rule, therefore they must have done so because of that change in the law. In so arguing, BCFM would have us ignore the general economic boom of the late 80's, the double digit annual growth of broadcasters' cash flow at that time, changes in the tax code, the addition of hundreds of new FM stations, the growing obsolescence of AM in the face of FM competition, the decline of television network viewing, the growth of cable as a competitive medium, the universal availability of VCRs and scores of other factors which have affected the broadcast industry.

BCFM has offered nothing which would demonstrate that the abolition of the trafficking rule caused any decline in programming or had any adverse impact on the general health of the broadcast industry. BCFM has provided no evidentiary support for either the proposed lengthening of the current one year restriction on the holding of licenses obtained through the comparative process or for the reestablishment of the prior three year rule.

The only question properly posed by this Further Notice is whether the public interest considerations which led to the elimination of the prior rule are offset by other public interest considerations specific to the comparative hearing process which

would be sufficient to warrant the modification of the existing one year holding period. As RSSM has noted in its initial comments, the change proposed by the Commission has detriments as well as presumed benefits.[5] These detriments have also been widely cited in the comments filed by other parties and hopefully will receive the Commission's careful attention. In that event the merit of the NAB's initial proposal to make available a voluntary continuity of service preference would be apparent.

One final point raised by BCFM warrants brief discussion. It argues that the holding period should apply even where a case is settled because that settlement is based upon the comparative standing of the parties. (BCFM Comments at 21-23.) This vastly oversimplifies the settlement process. We are unaware of any study ever conducted that examined the reasons why applicants agreed to settle. From personal experience, however, we know that there are many reasons including the expense of proceeding with litigation, the desirability of the facility in question, the time necessary to complete litigation, the likelihood of winning and the inherent risks of litigation, the availability of other similar properties and, of course, what consideration is given for settlement. The relative weight of such factors will depend on

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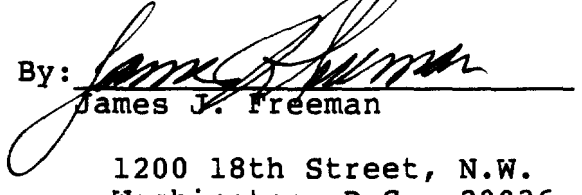
[5] As noted by the NAB in its comments, the public interest benefits presumed to flow from effectuation of the comparative criteria are not the product of any empirical findings. It is ironic that the Commission is at one and the same time saying that it is in the public interest to have no other stations in the entire country (if you are an applicant in a comparative hearing) but that it is also in the public interest for one party to own four or more radio stations in the same market as a result of the relaxation of the multiple ownership rules.

the particular circumstances, but it is an unusual case where one applicant stands clearly above the others based upon the comparative factors and even where there is a clear comparative leader, that applicant may have other defects such as financial questions. In short, the settlement process cannot be regarded as a private substitute for an agency finding as to the best comparative applicant. It follows from this that there is no reason to require a settling party to retain ownership of a station or to maintain its integration proposal.[6]

As noted above, we believe that a service continuity preference would best serve the public interest, but if the Commission decides to impose a longer mandatory holding period, it should limit its applicability to minimize the detrimental effects, especially unfair retroactivity, by applying any new rule only to new or, perhaps, pending cases where grants are made in express reliance upon the comparative criteria.

Respectfully submitted,

REED SMITH SHAW & McCLAY

By: 
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6 The Commission's decision to abolish the Ruarch policy is based on this same misconception as to settlements. Comparative Hearings, 6 FCC Rcd 157, 159-60 (1990), recon. granted in part, 6 FCC Rcd 3403 (1991). That error should be revisited and should not be compounded by also applying a mandatory holding period to settlement cases.